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No. 93-779

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DOROTHEA HUNTER, ADMINISTRATRIX OF THE ESTATE OF DAVID B. HADDEN, DECEASED AND IN HER OWN RIGHT,

Petitioners,

v.

CARBONDALE AREA SCHOOL DISTRICT AND NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT, CARBONDALE AREA SCHOOL DISTRICT IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether this Court, as in prior cases, should deny petitioners' Petition for Writ of Certiorari and affirm that a public school district cannot be held liable for harm caused to public school children by private actors occurring off of school property after school hours?

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CARBONDALE AREA SCHOOL DISTRICT AND NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT, CARBONDALE AREA SCHOOL DISTRICT IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Petitioners, Dorothea Hunter, Administratrix of the Estate of David B. Hadden, deceased, and in her own right, filed suit against respondents, Carbondale Area School District and Northeastern Education Intermediate

Unit No. 19, as a result of the drowning death of petitioners' minor decedent on November 16, 1989. Petitioners allege that the minor decedent, David B. Hadden, was forced into or was caused to have slipped, stumbled or fallen into Fallbrook Creek in Carbondale, Lackawanna County, Pennsylvania, by various other juvenile individuals who allegedly were chasing the minor decedent at the time threatening to do bodily harm to him. In essence, petitioners are alleging that the minor decedent, upon being released from after school detention, was pursued by several students, with whom he allegedly did not get along, into a nearby stream which was off of school property.

Petitioners' claims against Carbondale Area School District are based on the alleged duty of a school district to protect the life, liberty and property of students from, in this case, constitutional deprivations by private actors, fellow students of the minor decedent. It is undisputed that the harm suffered by petitioners' minor decedent was caused by fellow students who were private actors and that the injury to the minor decedent occurred off of school property after school hours.

Contrary to the allegations contained in petitioners' Petition for Writ of Certiorari, there is no evidence, nor even an allegation in petitioners' Amended Complaint filed in the District Court, that Carbondale Area School District participated in, condoned or even had knowledge of the harm allegedly being inflicted upon petitioners' minor decedent by his fellow students on the day in question. There are no averments in petitioners' Amended Complaint that the Carbondale Area School District or any of its agents were present for, or witnessed, the alleged Constitutional deprivations. Petitioners incorrectly aver in their Petition that Carbon-

dale Area School District had prior knowledge of or condoned the private individual's misconduct against petitioners' minor decedent.

Allegations that Carbondale Area School District failed to help petitioners' minor decedent when requested or ignored pleas for help are glaringly absent in petitioners' Amended Complaint. Petitioners failed to allege in their Amended Complaint that Carbondale Area School District condoned, approved, gave tacit approval of, or failed to take remedial action in the wake of known Constitutional deprivations being worked against petitioners' minor decedent by private actors.

Petitioners' general allegations that Carbondale Area School District was "aware" that special education students in general were "picked on" by other students is insufficient, as found by both the District Court and the United States Court of Appeals for the Third Circuit, as a matter of law to impose liability on the School District. There are no allegations in petitioners' Amended Complaint that the minor decedent requested or sought help from any agent or employee of Carbondale Area School District on the day in question. There are no allegations that the Carbondale Area School District knowingly ignored minor decedent's pleas for help, because no such pleas for help were made by minor decedent or his family on the day in question or at any time prior thereto.

Interestingly, petitioners point to the fact that petitioners' minor decedent apparently asked a fellow student for help on the day in question. Petitioners do not assert that any such help was requested from any employee or agent of Carbondale Area School District.

Petitioners' attempts to equate alleged vague knowledge by the School District reflected in a transcript of a Coroner's Inquest that special education students were "picked on" in general, does not, as petitioners contend, amount to a policy, custom or practice of Constitutional deptivation by Carbondale Area School District. The harm caused to petitioners' minor decedent was inflicted by private actors and not employees or agents of Carbondale Area School District. No policy, practice or custom is alleged in petitioners' Amended Complaint.

Petitioners failed to allege any direct involvement of the Carbondale Area School District with petitioners' minor decedent's ordeal. Petitioners' averments that the School District knew for quite some time that petitioners' minor decedent had been pursued, ridiculed, beaten and abused by fellow students is not supported by the record submitted by petitioners. There being no special relationship between the School District and minor decedent sufficient to invoke Constitutional protection from harm caused by private actors, petitioners' allegations must fail.

SUMMARY OF ARGUMENT

Petitioners fail to set forth any sufficient reason for this Court to grant the Petition for Writ of Certiorari to review the decisions of the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit. Both lower Courts properly interpreted this Court's prior decision in *DeShaney v. Winnebago Co. Dept. of Social Servs.*, 489 U.S. 189 (1989).

This Court previously had opportunity to review a similar case by way of *certiorari* and declined to do so.

In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir. 1992), *cert. denied*, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993), the United States Court of Appeals for the Third Circuit correctly declined to impose any Constitutional duty on a school district to protect students from misconduct of other students.

In *D.R.*, plaintiff alleged that the school district defendant had knowledge of the physical, verbal and sexual abuse committed by student defendants against minor plaintiff and maintained a policy of laxity towards such conduct. *Id.* at 1367. After noting the appropriate standard of review on a Motion to Dismiss, the Third Circuit Court of Appeals followed this Court's decision in *DeShaney v. Winnebago Co. Dept. of Social Servs.*, 489 U.S. 189 (1989) and declined to impose any Constitutional duty on a school district to protect students from misconduct of other students.

The Third Circuit in *D.R.* rejected arguments that the school district "restricted" a student's freedom to the extent that the student was prevented from meeting her basic needs. The school defendants' authority over *D.R.* during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*, particularly when their channels for outside communication were not totally closed. *Id.* at 1372.

Moreover, in *D.R.*, it was accepted that at least one (1) school district defendant was advised of the alleged misconduct which led to plaintiff's harm and apparently did not investigate the allegations. The Court of Appeals noted that while this may have amounted to nonfeasance, it did not rise to the level of a Constitutional violation.

In this case, there is not even an allegation, and none could be supported, that any Carbondale Area School District official had knowledge of any alleged violence being committed against petitioners' minor decedent on the day in question or on any prior day. Thus, even this remote allegation of "knowledge" is lacking in the within action.

This Court declined to accept *certiorari* in the *D.R.* case. Courts are consistent in finding that a school district does not have a Constitutional duty to supervise and protect students from assaults by other students. *See Maldonado v. Josey,* 975 F.2d 727 (10th Cir.), *cert. denied,* 113 S.Ct. 1266, 61 U.S.L.W. 3581 (1992); *Dorothy J. v. Little Rock School Dist.,* 794 F.Supp. 1405 (E.D. Ark. 1992); *Heard v. Lafourche Parish School Bd.,* 480 F.Supp. 231 (E.D.La. 1979); *See also Black v. Indiana Area School Dist.,* 985 F.2d 707 (3rd Cir. 1993) (children allegedly molested by school bus driver; judgment in favor of school district when perpetrator of alleged sexual molestation upon minor students was an adult school bus driver under contract with school district to provide bus services); *Doe v. Special School Dist. of St. Louis County,* 901 F.2d 642 (8th Cir. 1990) (requisite knowledge and deliberate indifference of school district not established). These cases are consistent with the line of cases refusing to impose a duty to protect individuals from Constitutional deprivations by private actors. *See DeShaney v. Winnebago Co. Dept. of Social Servs.,* 489 U.S. 189 (1989); *McComb v. Wambaugh,* 934 F.2d 474 (3rd Cir. 1991); *Estate of Gilmore v. Buckley,* 787 F.2d 714 (1st Cir. 1986); *Crosby v. Luzerne Co. Housing Auth.,* 739 F.Supp. 951 (M.D. Pa. 1990), *aff'd,* 919 F.2d 133 (3rd Cir. 1991).

Petitioners attempt to allege that there is a "conflict" among the Federal Appellate Courts and urge this Court to grant the Petition for Writ of Certiorari on that ground. The cases cited by petitioners to create this alleged conflict, however, deal with allegations of misconduct by school district agents or employees rather than by private actors.

For example, in *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir.), *cert. denied*, 113 S.Ct. 1066, 122 L.Ed.2d 371 (1992), *reargument en banc ordered*, 987 F.2d 231 (5th Cir. 1993), the sexual molestation was perpetrated by a teacher employee of the school district. The school district superintendent and principal were repeatedly made aware of the conduct between the school district employee teacher and the minor student. The *Doe* case is clearly distinguishable on its facts from the within case and the consistent holdings of this Court and other federal courts declining to impose a Constitutional duty for the actions of non-state actor defendants.

Petitioners advance no reason for this Court to review the decisions of the United States District Court for the Middle District of Pennsylvania and the Third Circuit Court of Appeals. The dismissal of petitioners' Amended Complaint is consistent with prior decisions and with this Court's denial of *certiorari* in previous cases.

ARGUMENT

It is clear that the District Court and Third Circuit Court of Appeals accepted the facts plead in petitioners' Amended Complaint as true for purposes of the Motion to Dismiss. In so doing, those Courts noted the well

established precedent that the Federal Constitution does not impose an affirmative duty upon the state to protect the life, liberty and property of its citizens against harm by private actors. *See Collins v. City of Harker Heights,* ___ U.S. ___ , 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The doctrine that a school district does not have a Constitutional duty to protect the life, liberty or property of a student from deprivation by private actors was reaffirmed by both the District Court and Court of Appeals. *See DeShaney v. Winnebago Co. Dept. of Social Servs.,* 489 U.S. 189 (1989).

In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School,* 972 F.2d 1364 (3rd Cir. 1992), *cert. denied,* 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993), this Court did not accept *certiorari* in a case involving harm inflicted upon a student on school district property during school hours by private actors. In this case, the harm inflicted was done off of school property and after school hours by private actors. The *D.R.* Court's reasoning is more applicable in this case when there is no allegation that any school district employee or agent was made aware of minor decedent's predicament or acquiesced or condoned any activity conducted by private actors.

Other federal courts to consider the precise issue present here have declined to impose a duty on a school district to prevent injury to a student by fellow students. In *Dorothy J. v. Little Rock School Dist.,* 794 F.Supp. 1405 (E.D.Ark. 1992), plaintiff had been in a special education program for quite some time. The mentally handicapped student ultimately was sexually assaulted by another mentally handicapped student. The Court reasoned that the time lapse between the placing of the student in the program and the attack showed that the attack was independently conceived and executed by

the private actor and the school district neither condoned nor encouraged the behavior.

The only allegation in petitioners' Amended Complaint of physical harm inflicted upon minor decedent conerns the incident on November 16, 1989. Petitioners in this case acknowledge that the minor decedent was in the special education program in the Carbondale Area School District for several years. Had the minor decedent been suffering the harm alleged, he, or his family, were free on a daily basis at home or elsewhere to seek the aid of others outside the school system.

Similarly, in *Heard v. Lafourche Parish School Bd.*, 480 F.Supp. 231 (E.D. La. 1979), the Court held that allegations that a school district failed to give protection to one (1) of its students do not state a cause of action upon which relief could be granted. As noted by the Court in *Heard,* Section 1983 imposes liability for violations of rights protected by the Constitution, not for violation of duties of care arising out of tort law. *See Baker v. McCollan,* 443 U.S. 137 (1979). Even with an allegation that the minor decedent in *Heard* requested assistance from the school's principal who refused any assistance, the Court granted the school board's Motion to Dismiss.

In *Maldonado v. Josey,* 975 F.2d 727 (10th Cir.), *cert. denied,* 113 S.Ct. 1266, 61 U.S.L.W. 3581 (1992), the Tenth Circuit Court of Appeals refused to impose a special duty on a school district to prevent harm to a student from the hands of private actors. The Court also discussed a similar claim against a teacher, a claim which is absent in this case.

Consistent with these holdings, in *Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993), the

Court dismissed allegations against a school district when the sexual molestation was perpetrated by a school bus driver against students. The requisite state involvement was lacking to impose liability on the school district. The children allegedly molested were six (6), seven (7) and eight (8) years old.

The facts revealed that at least two (2) complaints were made about the school bus driver's activities. Such prior complaints in this case glaringly are absent. Moreover, the alleged attack occurred after school hours and off of school property and was perpetrated by entirely private actors.

This line of cases refusing to impose a duty on a school district to protect a student from Constitutional deprivations perpetrated by private actors is consistent with long standing decisions of this Court and other federal courts declining to impose liability for the actions of private actors. *See DeShaney v. Winnebago Co. Dept. of Social Servs.*, 489 U.S. 189 (1989); *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986); *Crosby v. Luzerne Co. Housing Auth.*, 739 F.Supp. 951 (M.D. Pa. 1990), *aff'd*, 919 F.2d 133 (3rd Cir. 1991).

These cases recognize the distinction enunciated in this Court's opinion in *DeShaney v. Winnebago Co. Dept. of Social Servs.*, 489 U.S. 189 (1989). That is, the distinction between harm inflicted by a state agent and injury caused by a private individual is critical. When harm is inflicted by a private individual rather than a state actor, recovery is not permitted. *See McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991). Petitioners have made no allegations to support a reversal or re-examination of that reasoning and the alleged "conflict" is illusory.

Both *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir.), *cert. denied,* 113 S.Ct. 1066, 122 L.Ed.2d 371 (1992), *reargument en banc ordered,* 987 F.2d 231 (5th Cir. 1993) and *Lopez v. Houston Indep. School Dist.*, 817 F.2d 351 (5th Cir. 1987), are distinguishable on their facts. In both of those cases, the harm inflicted upon the student was caused by state actors, a state-employed school teacher and a state-employed bus driver, respectively. This case does not involve harm caused by state actors, but involves harm caused by private actors, the minor decedent's fellow students.

The Court in *Doe v. Taylor* specifically stated, "[t]his does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." *Id.* at 147. The Court in *Doe v. Taylor* also noted that the contours of a school district's duty as it pertains to injuries inflicted by someone other than a school teacher or subordinate were not before it. *Id.* at 147 n.14. Significantly, this Court previously not only denied *certiorari* in the *D.R.* and *Maldonado* cases, but also in the *Doe v. Taylor* case.

Moreover, the *Lopez* case dealt with a failure to properly train a school bus driver in the face of unequivocal evidence of a pre-existing pattern of fights on buses. The Court found that the widespread problem mandated an official response. Again, this pales in Constitutional comparison to the situation present here involving one (1) incident as alleged in petitioners' Amended Complaint. *See Doe v. Special School Dist. of St. Louis County,* 901 F.2d 642 (8th Cir. 1990).

Petitioners reliance on *Pagano by Pagano v. Massapequa Public Schools,* 714 F.Supp. 641 (E.D. N.Y. 1989) to support the finding of a conflict among the Circuits also is misplaced. In *Pagano,* the Court acknowledged

that school officials expressly said they would take necessary steps to prevent attacks on a student from occurring in the future. There is no allegation in petitioners' Amended Complaint that any such gratuitous promise was made by the School District in this case nor is there even an allegation that any such help was requested.

Petitioners attempt to distinguish the *D.R.* case by the age or mental capacity of the victim is without merit. As noted, courts that considered the issue have dismissed complaints against school districts brought by students of grade school years, *see Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993), and students with mental disabilities. See *Dorothy J. v. Little Rock School Dist.*, 794 F.Supp. 1405 (E.D. Ark. 1992).

Petitioners ignore the fact that minor decedent was told to report to detention the following day. Petitioners are silent as to the actions of the minor decedent or his parents during the intervening day. Minor decedent's age or mental capacity did not foreclose him from seeking help outside of school the night before his scheduled detention or at any time prior or subsequent. It would be anomalous for this Court to set a Constitutional standard which is based on the age and mental capacity of the victim.

Petitioners' attempt to show that the detention of the minor decedent either was not disciplinary in nature or clearly exceeded reasonable discipline is specious. Reasonable corporal punishment of students, even special education students, is not at odds with the Due Process Clause and does not constitute arbitrary state action. *See Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990). Discipline in the school context to evoke Constitutional protection must cause injury so severe or so disproportionate to the need

of official power, literally shocking the conscious. *See Wise v. Pea Ridge School Dist.*, 855 F.2d 560 (8th Cir. 1988); *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). Petitioners have not alleged any action on behalf of the School District which "shocks the conscious". *See Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982).

Petitioners' own papers belie petitioners' argument that the minor decedent had no avenues of help outside of the school system. First, petitioners do not explain why petitioners did not intervene. Secondly, petitioners admit that minor decedent did seek the aid of a fellow student on the day in question. Again, there is no indication in petitioners' Amended Complaint that petitioners sought any aid or help from the School District or its employees or agents.

Petitioners' allegations that the imposition of detention on the minor decedent somehow created or gave rise to a "special relationship" between the School District and minor decedent ignores the fact that the harm perpetrated upon minor decedent occurred after school hours and off of school property. The harm inflicted did not occur in the detention room. Moreover, there is no allegation in petitioners' Amended Complaint that the detention room teacher was made aware of any harassment or problems involving minor decedent and his fellow students.

Respondent avers that after school detention is no more confining or limiting to a student's ability to seek channels of help outside of the school system than is requiring the student to ride a school bus or be present in a class with a certain teacher and a certain group of

classmates. As this Court noted in *DeShaney v. Winnebago Co. Dept. of Social Servs.*, 489 U.S. 189 (1989), the limited affirmative duty to protect an individual from harm perpetrated by private individuals arises not from the state's alleged knowledge of a specific predicament or from the state's expressions of an intent to help, but from the limitation which the state has imposed on the individual's freedom to act on his or her own behalf.

As the Third Circuit Court of Appeals noted in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School,* 972 F.2d 1364 (3rd Cir. 1992), *cert. denied,* 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993), there is no "custody" in the Constitutional sense in attendance at school which gives rise to Constitutional protection. It would be anomalous for the Court to accept petitioners reasoning that by placing minor decedent in after school detention, the School District thereby assumed a Constitutional duty which is not otherwise imposed. As the District Court correctly noted in its opinion, the minor decedent was free not to attend detention and could have sought relief from channels outside of the school if he so desired.

As correctly noted by the District Court, there is nothing in the allegations of petitioners' Amended Complaint, or the numerous records and documents attached to petitioners' briefs filed, which suggests that the School District facilitated or authorized the students who chased and threatened the minor decedent to engage in that conduct. The unwarranted assault against the minor decedent was perpetrated by private individuals off school property and after school was over for the day.

At most, petitioners allege one (1) unconstitutional act by the School District. Such allegations as a matter of law are insufficient to impose liability on the School District. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985); *Henley v. Octorara Area School Dist.*, 701 F.Supp. 545 (E.D. Pa. 1988). That is, evidence of a single incident of unconstitutional conduct is not sufficient for purposes of establishing a policy or procedure under Section 1983. *Id.*

As this Court noted in *DeShaney,* no constitutional violation is stated when, at most, it could be said that the state's functionaries or agents stood by and did nothing when suspicious circumstances dictated a more active role. Absent allegations of direct involvement by the state or, in this case, the School District, no constitutional claims are stated.

CONCLUSION

The question of whether a school district or other party has any Constitutional duty to protect students or individuals from misconduct of other students or private actors is settled. The conflict between the Circuits alleged by petitioners is illusory. The law is clear that petitioners' Amended Complaint is not sustainable as a matter of law and the District Court and Third Circuit

Court of Appeals correctly interpreted the facts and law in dismissing petitioners' action. As such, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December 14, 1993

CERTIFICATE OF SERVICE

I, MICHAEL A. GENELLO, ESQUIRE, hereby certify that I have served the original and forty (40) true and correct copies of the foregoing Brief of Respondent, Carbondale Area School District, by hand delivery, upon Clerk, Supreme Court of the United States, Washington, D.C., 20543, and three (3) copies on this 14th day of December, 1993 by First Class Mail upon the following:

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